No. 15-474

In the
# Supreme Court of the United States

ROBERT F. MCDONNELL,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF AMICUS CURIAE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE IN SUPPORT OF PETITIONER

CHARLES J. COOPER
*Counsel of Record*
DAVID H. THOMPSON
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

*Counsel for Amicus Curiae*

March 7, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 4

I. Interpreting the Federal Wire-Fraud and Extortion Statutes As Criminalizing the Facilitation of Access to Government Officials Renders Those Laws Unconstitutionally Vague. ..... 5

II. The Fourth Circuit's Interpretation of the Federal Wire-Fraud and Extortion Statutes Violates Principles of Lenity. ..... 17

III. The Fourth Circuit's Interpretation of the Federal Wire-Fraud and Extortion Statutes Violates Established Constitutional Principles of Federalism. ..... 20

CONCLUSION ..... 27

# TABLE OF AUTHORITIES

CASES — Page

*Bell v. United States*,
349 U.S. 81 (1955) ..... 18

*Bond v. United States*,
134 S. Ct. 2077 (2014) ..... 25

*Citizens United v. FEC*,
558 U.S. 310 (2010) ..... 2, 6

*Cleveland v. United States*,
531 U.S. 12 (2000) ..... 25

*Connally v. General Constr. Co.*,
269 U.S. 385 (1926) ..... 6

*Coyle v. Smith*,
221 U.S. 559 (1911) ..... 24

*Evans v. United States*,
504 U.S. 255 (1992) ..... 4, 7, 15

*FERC v. Mississippi*,
456 U.S. 742 (1982) ..... 22, 23

*Fry v. United States*,
421 U.S. 542 (1975) ..... 21, 24

*Garcia v. San Antonio Metro. Transit Auth.*,
469 U.S. 528 (1985) ..... 24

*Grayned v. City of Rockford*,
408 U.S. 104 (1972) ..... 10

*Gregory v. Ashcroft*,
501 U.S. 452 (1991) ..... *passim*

*Jones v. United States*,
529 U.S. 848 (2000) ..... 25

*Kolender v. Lawson*,
461 U.S. 352 (1983) ..... 10, 11, 15, 17

*McBoyle v. United States*,
283 U.S. 25 (1931) ..... 18

*McCutcheon v. FEC*,
134 S. Ct. 1434 (2014) ..... 2, 21, 22

*McNally v. United States*,
483 U.S. 350 (1987) ..... 25, 26

*National League of Cities v. Usery*,
426 U.S. 833 (1976) ..... 24

*New State Ice Co. v. Liebmann*,
285 U.S. 262 (1932) ..... 23

*Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77 (1981) ..... 19

*Rewis v. United States*,
401 U.S. 808 (1971) ..... 3, 18, 25

*Robers v. United States*,
134 S. Ct. 1854 (2014) ..... 19

*Skilling v. United States*,
561 U.S. 358 (2010) ..... *passim*

*Smith v. United States*,
508 U.S. 223 (1993) ..... 19

*United States v. Bass*,
404 U.S. 336 (1971) ..... 18, 25

*United States v. Birdsall*,
233 U.S. 223 (1914) ..... 10

*United States v. Dimora*,
750 F.3d 619 (6th Cir. 2014) ..... 15

*United States v. Enmons*,
410 U.S. 396 (1973) ..... 26

*United States v. Gradwell*,
243 U.S. 476 (1917) ..... 19

*United States v. Harriss*,
347 U.S. 612 (1954) ..... 22

*United States v. Hudson and Goodwin*,
11 U.S. (7 Cranch.) 32 (1812) ..... 19

*United States v. Loftus*,
992 F.2d 793 (8th Cir. 1993) ..... 9

*United States v. Rabbitt*,
583 F.2d 1014 (8th Cir. 1978) ..... 9

*United States v. Santos*,
553 U.S. 507 (2008) ..... 3, 18, 20

*United States v. Sun-Diamond Growers of Cal.*,
526 U.S. 398 (1999) ..... 8, 20

*United States v. Universal CIT Credit Corp.*,
344 U.S. 218 (1952) ..... 18

*United States v. Urciuoli*,
513 F.3d 290 (1st Cir. 2008) ..... 9

*Valdes v. United States*,
475 F.3d 1319 (D.C. Cir. 2007) ..... 8, 9

STATUTORY PROVISIONS AND RULES

18 U.S.C. § 201(a)(1) ..... 7

18 U.S.C. § 201(b)(2) ..... 8

18 U.S.C. § 201(a)(3) ..... 8

18 U.S.C. § 666 ..... 7

18 U.S.C. § 1341 ..... 7

18 U.S.C. § 1346 ..... 7

18 U.S.C. § 1951 ..... 7

18 U.S.C. § 1952 ..... 7

18 U.S.C. § 1961–1968 ..... 7

SUP. CT. R. 37.2(a) ..... 1

SUP. CT. R. 37.6 ..... 1

VA. CODE §§ 2.2-3103 ..... 22

VA. CODE §§ 2.2-3113 through -3118.1 ..... 22

OTHER

*$18,000 Vacation Puts Kaine Atop Gift Recipients List*, THE WASHINGTON TIMES, Feb. 4, 2006, http://goo.gl/LJHzcb ..... 16

Jim Geraghty, *Virginia's Long Tradition of Expensive Gifts to Governors*, NATIONAL REVIEW, Aug. 9, 2013, http://goo.gl/IBt5bs ..... 16

James V Grimaldi and Rebecca Ballahaus, *Hillary Clinton's Complex Corporate Ties: Family Charities Collected Donations from Companies She Promoted as Secretary of State*, WALL ST. J., Feb. 19, 2015, http://goo.gl/uqcpAS ..... 14

Lorenzo Hall, *Access to Gov. McAuliffe Can Be Bought for $50k, Through New PAC*, CBS NEWS, Mar. 19, 2014, http://goo.gl/lQniOG ..... 17

Tom Hamburger, *How Hillary Clinton Kept Her Wealthy Friends Close While at State Department*, WASH. POST, Oct. 5, 2015, https://goo.gl/V6Vw1r ..... 13, 14

THE FEDERALIST NO. 28 (Alexander Hamilton) (C. Rossiter ed., 1961) ..... 23

THE FEDERALIST NO. 78 (Alexander Hamilton) (C. Rossiter ed., 1961) ..... 19

Husna Haq, *Clinton E-mails: Did Donors Get Special State Department Access?*, CHRISTIAN SCI. MONITOR, Oct. 6, 2015, http://goo.gl/n3zF5I ..... 14

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940) ..... 15, 16

Barry L. Van Lare, *The Governors' Offices*, *in* THE BOOK OF THE STATES: 2009 (Council of State Governments 2009), http://goo.gl/sdV26L ..... 11

*Letters from The Federal Farmer*, *in* 2 HERBERT J. STORING, THE COMPLETE ANTIFEDERALIST (1981) ..... 23

THE FEDERALIST NO. 45 (James Madison) (C. Rossiter ed., 1961) ..... 20

DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) ..... 13

Michael W McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) ..... 23

Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011, http://goo.gl/pmc0SZ ..... 12

Bob Rayner, *Rayner: The Trouble with Gifts*, RICHMOND TIMES-DISPATCH, Aug. 14, 2013, http://goo.gl/46HrYZ ..... 16, 17

Sarah Westwood, *Nine times Clinton Foundation donors got special access at State*, WASHINGTON EXAMINER, Jan. 14, 2016, http://goo.gl/GyFHe9 ..... 13, 14

## INTEREST OF AMICUS CURIAE[1]

The Republican Governors Public Policy Committee ("RGPPC") is a Section 501(c)(4) social welfare organization incorporated in the District of Columbia. Its members include all 31 Republican State Governors as well as the Republican Territorial Governors. The RGPPC's mission includes promoting social welfare and efficient and responsible government practices; advocating public policies that reduce the tax burdens on United States citizens, strengthen families, promote economic growth and prosperity, and improve education; and encouraging citizen participation in shaping laws and regulations relating to such policies.

## SUMMARY OF ARGUMENT

Governor McDonnell was convicted for receiving things of value in return for agreeing to commit "official acts," but the specific actions the Governor took were not "official acts" as Congress has defined—or as this Court has understood—those terms. In fact, the five specific actions that were the legal basis for this prosecution amounted to little more than facilitating

---

[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that both parties have given blanket consent to the filing of amicus briefs in support of either party. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus, its members, or its counsel made such a monetary contribution.

an importunate constituent's access to other state policymakers—conduct that is extraordinarily commonplace. "Ingratiation and access," after all, "are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010). Indeed, they "embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality). The Fourth Circuit's reading of federal bribery law as criminalizing this type of everyday, everywhere conduct suffers from no fewer than three overriding flaws—flaws that go to the heart of the structure of government that our Constitution establishes and the rights that it protects.

1. The interpretation adopted in the opinion below violates the protections of the Fifth Amendment's Due Process Clause. Because the panel's reading of the laws in question attaches criminal penalty to extraordinarily common conduct without any support in the language of the relevant statutes, it violates that Clause's requirement that any conduct criminalized by federal law be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling v. United States*, 561 U.S. 358, 402 (2010). And because that interpretation endows federal officials with an unparalleled amount of prosecutorial discretion in an area that is uniquely politically charged, it further violates due

process by encouraging the "arbitrary and discriminatory enforcement" of federal bribery law. *Id.* at 402–03.

2. The Fourth Circuit's unprecedented reading of federal bribery law also violates longstanding principles of lenity. Both traditional requirements of fairness and the limits our constitutional system places on the role of the federal courts "require[ ] ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality). As shown below, the panel's interpretation of the wire-fraud and extortion statutes is implausible on its face and, in any event, foreclosed by the Constitution. But any doubt about that must "be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

3. The interpretation adopted by the decision below also runs afoul of deeply rooted principles of federalism. A State has the authority and responsibility to determine for itself the extent to which its officials should be allowed to accept gifts and provide constituents with access to other state policymakers, for such decisions are "of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). If Congress wishes to impose its own answers to questions like these, it must do so with unmistakable clarity. *Id.* The Fourth Circuit's reading of the federal laws in question, in other words, requires one to believe that

Congress whispered opaquely in an area where our Constitution and traditions require a statement of the highest clarity.

One may question the wisdom or morality of all of the choices Governor McDonnell has made. But the very essence of the rule of law is that even the most emphatic conviction that a defendant *surely* did *something* wrong must yield to the limits embodied in our Constitution. By affirming Governor McDonnell's conviction on the basis of an interpretation of federal bribery law that is so patently flawed, the Fourth Circuit erred—and it erred in a way that threatens to dramatically reorient the most fundamental aspects of our political system. This Court should reverse.

## ARGUMENT

To establish that Governor McDonnell violated the federal wire-fraud and extortion statutes, the Government had to prove both that he received one or more things of value and that he accepted those things of value in return for agreeing to commit "official acts." There is no question that Governor McDonnell accepted several things of value from Jonnie Williams and that he exercised poor judgment in doing so, notwithstanding that it was entirely legal under Virginia law. But a lapse in judgment of this kind does not violate federal bribery law unless the Government also proves the "official act" element. Indeed, since mere campaign contributions can be the "thing of value" in a federal bribery prosecution, *Evans v. United States*, 504 U.S. 255, 257–59 (1992), in many cases—as in

Governor McDonnell's—the "official act" element may be the only one with any bite. And in this case, Governor McDonnell was convicted—and that conviction was affirmed—based on an interpretation of the "official act" requirement that essentially eliminates it. Congress has not commanded such an intolerable result, at least not clearly and unambiguously. And interpreting what Congress *has* said in this way faces three overwhelming difficulties.

## I. Interpreting the Federal Wire-Fraud and Extortion Statutes As Criminalizing the Facilitation of Access to Government Officials Renders Those Laws Unconstitutionally Vague.

Governor McDonnell was convicted in part for taking actions that, in the main, are indistinguishable from actions that nearly every elected official in the United States takes nearly every day. We emphasize that our focus here is not on the *quid*—what Governor McDonnell accepted—or the *pro*—the alleged agreement between Governor McDonnell and Mr. Williams—but rather on the *quo*—the particular acts that formed the basis of Governor McDonnell's conviction. Rather than find that the Governor actually ordered or influenced state officials to do what Mr. Williams really wanted—perform state-sponsored studies of Anatabloc, a dietary supplement sold by Mr. Williams's company—the Fourth Circuit affirmed his conviction based on such mundane conduct as "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy

advisor to 'see' him about an issue." Pet.App.73a. These actions amount to nothing more than facilitating Mr. Williams' access to other state officials. But "[i]ngratiation and access," this Court has emphasized, "are not corruption." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010). Indeed, they are extraordinarily commonplace.

If the federal government wishes to criminalize ubiquitous practices like these, it must at the very least do so in terms that are clear and definite. For the Constitution requires as "the first essential of due process of law," *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), that any criminal law "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement," *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (alterations in original) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The Fourth Circuit's reading of the wire-fraud and extortion statutes violates the Fifth Amendment's Due Process Clause on both scores.

1. The Fourth Circuit's reading of the wire-fraud and extortion statutes does not provide clear notice that the conduct those statutes now encompass—mere facilitation of access—is prohibited. A conscientious state official must traverse a tortuous path through the United States Code even to *discover* that his or her conduct is regulated by federal bribery law.

Because the federal bribery statute applies only to *federal officials*, 18 U.S.C. § 201(a)(1), federal prosecutors have been able to impose the federal regime on state officials only by taking a detour through two other statutes, both of whose application to bribery is, as a matter of first principles, far from clear.[2] The wire-fraud statute's opaque bar on interstate schemes "to deprive another of the intangible right of honest services," *id.* §§ 1341, 1346, includes bribery only because this Court interpreted it as doing so in order to cabin its vagueness, *see Skilling*, 561 U.S. at 403–13. And while the Hobbs Act criminalizes extortion "under color of official right," 18 U.S.C. § 1951, there is strong evidence that Congress understood this crime as limited to situations in which "money or property [are] obtained under the pretense that the officer was *entitled* thereto by virtue of his office," *see Evans*, 504 U.S. at 279–84 (Thomas, J., dissenting) (emphasis altered), and it today applies to ordinary bribery only because this Court rejected this limitation in a divided decision, *id.* at 260–71 (majority opinion).

The federal wire-fraud and extortion statutes, then, incorporate federal bribery law only because the courts have adopted contested interpretations of those statutes. The Fourth Circuit has now effectively done

---

[2] In addition to the wire-fraud and extortion statutes, state and local officials might be liable for the federal crime of bribery by way of the Travel Act, 18 U.S.C. § 1952, the federal-programs bribery act, 18 U.S.C. § 666, or RICO, 18 U.S.C. §§ 1961–1968. Governor McDonnell was not charged under any of these statutes.

away with a critical limitation on federal bribery law's expanding reach: the "official act" requirement. 18 U.S.C. § 201(b)(2). But Congress's own definition of that key term underscores its narrowness: not all actions that are " 'official acts' in some sense" are " 'official acts' within the meaning of the statute," *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 407 (1999), a class that includes only those "decision[s] or action[s]" which a public official takes on a "question, matter, cause, suit, proceeding or controversy, which may at any time be pending" before the official in his "official capacity," 18 U.S.C. § 201(a)(3). Far from including such mundane, everyday activities as setting up meetings or attending luncheons, that narrow definition of "official act" fairly includes only actions on questions "that the government had authority to decide," or "decisions that the government actually makes." *Valdes v. United States*, 475 F.3d 1319, 1324–25 (D.C. Cir. 2007) (en banc). Indeed, both this Court and three federal courts of appeals have read the "official act" requirement in this sensible, limited way.

In *Sun-Diamond*, this Court rejected as "absurd[ ]" an interpretation of "official act" that "would criminalize, for example, token gifts to the President such as the replica jerseys given by championship sports teams each year during ceremonial White House visits" or "a high school principal's gift of a school baseball cap to the Secretary of Education on the occasion of the latter's visit to the school." 526 U.S. at 406–07. Similarly, in *Valdes*, the D.C. Circuit,

sitting en banc, refused to count as an "official act" a police officer's search of police databases for publicly available information, reasoning that such an interpretation would read the narrow definition of "official act" "out of the statute entirely." 475 F.3d at 1320, 1322–23. The First Circuit has come to the same conclusion, interpreting "official act" as excluding a state legislator's informal advocacy on behalf of a local business, even though that advocacy "traded in part on the reputation, network and influence that comes with political office," because "there is no indication that [the legislator] invoked any purported oversight authority or threatened to use official powers in support of his advocacy." *United States v. Urciuoli*, 513 F.3d 290, 296 (1st Cir. 2008). And in *United States v. Rabbitt*, the Eighth Circuit likewise reversed a conviction for extortion where the defendant, a state Speaker of the House, did no more than use his influence to "gain" an alleged bribe-payer "a friendly ear" with other state officials. 583 F.2d 1014, 1028 (8th Cir. 1978), *abrogated on other grounds by McNally v. United States*, 483 U.S. 350, 356 (1987); *see also United States v. Loftus*, 992 F.2d 793, 796 (8th Cir. 1993) (noting that in *Rabbitt* the defendant "promised only to introduce the [other party] to influential persons; he did not promise to use his official position to influence those persons"). As the Governor's brief ably shows, the opinion below simply cannot be squared with these decisions. That alone is a sufficient reason for this Court to reverse the decision below.

This Court's decision in *United States v. Birdsall*, 233 U.S. 223 (1914), is not to the contrary—in fact, it is not even to the point. *Birdsall* merely held that "official acts" extend beyond those "prescribed by statute" or "by a written rule or regulation," to acts "clearly established by settled practice" as part of the defendant's official duties. 233 U.S. at 230–31. The case does *not* say, or even imply, that *all* actions that are part of an office's "established usages and practices," *id.* at 229, count as "official acts."

It is conceivable, of course, that both this Court and every other federal court of appeals to have faced the issue erred in concluding that Congress did not mean for the term "official act" to cover mundane actions like the ones in this case. But what does not seem in doubt—and what matters for the purposes of the Due Process Clause—is that even if Congress *did* mean to proscribe conduct like this, it did not do so "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (quoting *Kolender*, 461 U.S. at 357).

2. The Fourth Circuit's interpretation of the federal laws at issue also flouts the protections of the Due Process Clause by positively inviting arbitrary and discriminatory enforcement. That Clause's bar on vague criminal laws not only protects against laws that "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). It also ensures that the "legislature establish[es] minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S.

566, 574 (1974)). A vague statute, lacking such "minimal guidelines," threatens to "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Id.* (alteration in original) (quoting *Smith*, 415 U.S. at 575). The federal wire-fraud and extortion statutes, shorn by the Fourth Circuit of any meaningful "official act" limitation, invite just such unfair arbitrariness.

The statutes in question, on the Fourth Circuit's reading, can now strike arbitrarily in practice precisely because they could strike *everyone* in theory. As an organization of 31 state Governors, Amicus can attest that state chief executives are inundated by requests from constituents or interest groups to meet with them or someone working elsewhere in state government. Such requests "come to the governor by mail, e-mail, telephone and personal visits," and they are so numerous that many Governors have a "correspondence staff" that serves "as a referral mechanism seeing that constituent service requests are referred to state agencies for necessary action." Barry L. Van Lare, *The Governors' Offices*, *in* THE BOOK OF THE STATES: 2009 180, 181–82 (Council of State Governments 2009), http://goo.gl/sdV26L.

The records recently released from Jeb Bush's term as Governor of Florida provide a concrete example of the ubiquity of most of the actions for which Governor McDonnell was convicted. In January of 2003 alone, Governor Bush received 31 emails from individual constituents or groups—an average of one per day—requesting a meeting with him or someone

in his administration. The following month, he received 50 such meeting requests. He set up many of these requested meetings, and he specifically followed up eighteen times during the two months to confirm that a scheduled meeting had taken or would take place.[3]

Indeed, facilitating "access" is a central part of *any* modern elected official's job. For example, in 2012 President Obama's campaign reportedly had a "Speaker Series" program which "turn[ed] Cabinet secretaries and top White House advisors into fundraising surrogates. For $5,000, a donor can get a kind of season pass to see [Cabinet Secretaries and White House advisors] when they come to town." Peter Nicholas, *Administration Officials Double as Obama Campaign Speakers*, L.A. TIMES, Nov. 16, 2011, http://goo.gl/pmc0SZ. And even off the campaign trail, a large proportion of any politician's time is spent attending ceremonial luncheons and receptions and setting up meetings for constituents or influential

---

[3] We determined the numbers in the text by downloading Governor Bush's email records from both January and February 2003 in their native Microsoft Outlook format from http://goo.gl/sQqCkO, and searching them for the term "meet." We then reviewed each of the results to determine if a constituent or group requested a meeting with Governor Bush; we also documented instances in which Governor Bush verified that a meeting was scheduled or had already been completed. Subsequent to our research, the Outlook file containing Governor Bush's emails was removed from this website, and it is no longer available online

groups. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 53–59 (1974) (describing the ubiquity of "constituency service").

Emails released by Hillary Clinton from her tenure as Secretary of State further indicate how routine the facilitation of access is. As the Washington Post reported after sifting through those emails, "major donors to [Ms. Clinton's] family's causes gained high-level access to press their policy concerns inside the Clinton-led State Department." Tom Hamburger, *How Hillary Clinton Kept Her Wealthy Friends Close While at State Department*, WASH. POST, Oct. 5, 2015, https://goo.gl/V6Vw1r (hereinafter "Hamburger, *Wealthy Friends*").

For example, George Soros—a "top contributor to the Clinton Foundation"—"secured a meeting with Clinton in 2010 to discuss U.S. government funding for the American University of Central Asia, an educational institution that Soros helped support." *Id.* And in 2012, Soros "told a mutual friend he was 'impressed' by the level of access he was able to gain to Clinton while she served as secretary of state. Soros apparently said he enjoyed the fact that he could 'always' get a meeting or get on the phone with Clinton when he wanted to discuss his ideas for policies." Sarah Westwood, *Nine times Clinton Foundation donors got special access at State*, WASHINGTON EXAMINER, Jan. 14, 2016, http://goo.gl/GyFHe9 ("Westwood, *Clinton Foundation Donors*"). Similarly, "Ukrainian steel magnate Viktor Pinchuk," who has recently "pledged

more than $10 million to the Clinton Foundation," secured a meeting "with a top Clinton aide to speak on behalf of Ukraine's strongman president and to try to soothe tensions with Washington." Hamburger, *Wealthy Friends*.

Indeed, "[a]t least 60 companies that lobbied the State Department during [Secretary Clinton's] tenure donated a total of more than $26 million to the Clinton Foundation." James V Grimaldi and Rebecca Ballhaus, *Hillary Clinton's Complex Corporate Ties: Family Charities Collected Donations from Companies She Promoted as Secretary of State*, WALL ST. J., Feb. 19, 2015, http://goo.gl/uqcpAS. "The word was out to these groups that one of the best ways to gain access and influence with the Clintons was to give to this foundation." Husna Haq, *Clinton E-mails: Did Donors Get Special State Department Access?*, CHRISTIAN SCI. MONITOR, Oct. 6, 2015, http://goo.gl/n3zF5I. For example, "[a]n executive at Morgan Stanley enjoyed a warm welcome from Clinton in July 2009 when he reached out to schedule a meeting with her," to discuss "his economic advice for dealing with the Chinese market." Westwood, *Clinton Foundation Donors*.

The consequences, then, of broadening the definition of "official act" to include the mundane facilitation of access are breathtaking: if this Court adopts this understanding of "official act," potentially every elected official in the nation could be indicted for a felony, if the circumstances support the inference of a *quid pro quo*. And even in the campaign contribution context, the *quid pro quo* requirement is not onerous

and can be implied from conduct. *See, e.g.*, *Evans*, 504 U.S. at 267–68. In other words, under the theory adopted by the opinion below, the only thing standing between most, if not all, of our Nation's officials and a potential bribery conviction is prosecutorial discretion and "how a jury of twelve may assess the question of [the official's] subjective intent" in facilitating a supporter's access to government officials. *United States v. Dimora*, 750 F.3d 619, 633 (6th Cir. 2014) (Merritt, J., dissenting).

The Constitution cannot tolerate such a result, if for no other reason than federal prosecutors, loosed by the elimination of the "official act" restraint from any legal standards, will be left free to pursue "their personal predilections," *Kolender*, 461 U.S. at 358, in determining which officials to pursue. And this boundless discretion is made all the more intolerable by the political dynamics latent in any bribery prosecution. Justice Jackson, in a passage that has encapsulated for many the perils of prosecutorial discretion, wrote that "the most dangerous power of the prosecutor" is "that he can choose his defendants," and might in doing so be tempted to

> pick people that he thinks he should get, rather than pick cases that need to be prosecuted It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being at-

> tached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940). There is perhaps no context where Justice Jackson's warning has greater force than this one. The most salient characteristic of each of the elected officials in the slate from which federal prosecutors are invited to "choose their defendants," after all, may well be the letter that comes in parentheses after their name.

This risk that federal bribery prosecution will be politically motivated—or perceived as such—is very real, not hypothetical. For example, Governor McDonnell's immediate predecessor in office, Governor Tim Kaine—a Democrat—reported receiving $186,899 in gifts since he was first elected to statewide office in 2001. Jim Geraghty, *Virginia's Long Tradition of Expensive Gifts to Governors*, NATIONAL REVIEW, Aug. 9, 2013, http://goo.gl/IBt5bs. In 2005, for example, shortly before taking office as Governor, then-Lt. Governor Kaine accepted a ten-day stay, valued at $18,000, at the Caribbean island home of his campaign supporter, James B. Murray Jr., a Virginia businessman. *$18,000 Vacation Puts Kaine Atop Gift Recipients List*, THE WASHINGTON TIMES, Feb. 4, 2006, http://goo.gl/LJHzcb. After assuming office the following year, Governor Kaine reappointed Mr. Murray to a position on a state commission. Bob Rayner, *Rayner: The Trouble with Gifts*, RICHMOND TIMES-DISPATCH,

Aug. 14, 2013, http://goo.gl/46HrYZ. The year after that, "Kaine received gifts worth $3,237 for travel" from another state businessman, "whom Kaine just happened to name as deputy secretary of transportation that very year." *Id.* In like form, donors to the political action committee formed by Governor McDonnell's immediate *successor*, Terry McAuliffe, reportedly "get regular access to McAuliffe, including a private reception, a round-table discussion with state leaders, a retreat and a private dinner with McAuliffe and his family." Lorenzo Hall, *Access to Gov. McAuliffe Can Be Bought for $50k, Through New PAC*, CBS NEWS, Mar. 19, 2014, http://goo.gl/lQniOG.

According to the opinion below, of course, the determination that Governor McDonnell's conduct merits a bribery prosecution while Governor Kaine's and Governor McAuliffe's actions do not is one that Congress left to federal prosecutors—guided by little more than "their personal predilections." *Kolender*, 461 U.S. at 358. The Fourth Circuit erred in concluding that its interpretation did not render the federal wire-fraud and extortion statutes unconstitutionally vague, and it erred in presuming that Congress stepped so far over the void-for-vagueness line in the first place.

## II. The Fourth Circuit's Interpretation of the Federal Wire-Fraud and Extortion Statutes Violates Principles of Lenity.

As already shown, the language of the wire-fraud and extortion statutes and the protections afforded by our Constitution make the interpretation adopted by

the Fourth Circuit simply unsupportable. But "even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). Whatever else it may be, the application of federal bribery law to mundane conduct like attending luncheons and setting up meetings is not "clear and definite." *United States v. Universal CIT Credit Corp.*, 344 U.S. 218, 222 (1952). And the courts must "not derive criminal outlawry from some ambiguous implication." *Id.*

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality); *see also id.* at 528 (Stevens, J., concurring in judgment), but not "out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell v. United States*, 349 U.S. 81, 83 (1955). Rather, the "principle is founded on two policies," which not only "have long been part of our tradition," *United States v. Bass*, 404 U.S. 336, 348 (1971), but are embedded in the Constitution itself.

First, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). This is "a presupposition of our law." *Bell*, 349 U.S. at 83. But more than that, it is grounded in the very same "due process essentials,"

*Skilling*, 561 U.S. at 403, that undergird the vagueness doctrine just discussed.

Second, principles of lenity flow from the Constitution's separation of powers. Convinced that "there is no liberty if the power of judging be not separated from the legislative and executive powers," THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961), the Framers vested "the federal lawmaking power in the legislative, not the judicial, branch of government," *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 95 (1981). And it was settled early on that these limits deprive the federal courts of any power to create a common law of crimes. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch.) 32, 34 (1812). Imposing criminal liability on conduct not "plainly and unmistakably within the provisions of some statute," *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (internal quotation marks omitted), violates these settled limits.

To be sure, "[t]he mere possibility of articulating a narrower construction does not by itself make the rule of lenity applicable." *Smith v. United States*, 508 U.S. 223, 239 (1993). "Instead, that venerable rule is reserved for cases where, '[a]fter seiz[ing] every thing from which aid can be derived,' the Court is 'left with an ambiguous statute.' " *Id.* (alterations in original) (quoting *Bass*, 404 U.S. at 347 (internal quotation marks omitted)). But here, none of "the usual tools of statutory construction," *Robers v. United States*, 134 S. Ct. 1854, 1859 (2014), offers any support to the

Fourth Circuit's interpretation. The text of the relevant statutes militates *against* that strained reading. *See supra* pp. 6–10. And as this Court has held, "the numerous other regulations and statutes" governing the ethics of government officials strongly suggest that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999).

As shown above, the federal wire-fraud and extortion statutes *clearly do not* cover the actions Governor McDonnell was convicted for taking. But in any event, those statutes *do not clearly* cover those acts, and under our traditions, any "tie must go to the defendant." *Santos*, 553 U.S. at 514. The court below flouted these settled limits.

## III. The Fourth Circuit's Interpretation of the Federal Wire-Fraud and Extortion Statutes Violates Established Constitutional Principles of Federalism.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The powers delegated by the Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, at 292 (James Madison) (C. Rossiter ed., 1961). By preserving two levels of sovereign government in this

way, the Framers sought to secure a number of advantages: accommodating local diversity, promoting experimentation, and safeguarding individual liberty. Crucially, however, for federalism to yield any of these benefits, Congress must not be allowed to "impair[ ] the States' integrity or their ability to function effectively in a federal system," *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975), unless it makes its intent to do so "unmistakably clear in the language of the statute," *Gregory*, 501 U.S. at 460.

The Fourth Circuit's reading of federal bribery and extortion law risks criminalizing conduct that is a central part of every state chief executive's job: attending social events, setting up meetings, and emailing staff members. For this reason, it runs afoul not only of the Constitution's guarantees of fair notice and non-arbitrary treatment but also the very structure of government that that document establishes. By determining "the character of those who exercise government authority, a State defines itself as a sovereign," and if Congress wishes to interfere with such choices, it "must make its intention to do so unmistakably clear." *Id.* (internal quotation marks omitted). The federal statutes Governor McDonnell was convicted of violating do not even approach this level of clarity.

Facilitating constituents' access to government officials is one way in which elected officials can keep open the lines of communication that bind them to the interests of those they represent. The facilitation of access for political supporters "embod[ies] a central

feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Of course, allowing the unbridled exchange of money for "general gratitude" is not without risk; if "ingratiation and access" flow without any scrutiny, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. 612, 625 (1954). But it is surely for the State in the first instance to draw the line between these two interests. And in doing so, the State defines in the most fundamental way the relationship between its citizens and their representatives.

For example, within the bounds set by the Constitution, a State is free to regulate the exchange of money for access through disclosure laws or laws limiting the receipt of gifts. Virginia has enacted both of these types of restrictions, *see* VA. CODE §§ 2.2-3103, 2.2-3113 through -3118.1, and as the district court noted, "[t]here has been no suggestion in this case" that Governor McDonnell violated them, Pet.App.276a. But by calibrating the extent to which state residents can seek—and state officials can grant—access to state policymakers, Virginia defined the very nature of the representative relationship between its citizens and those who wield power in their name. And since the authority to define this relationship is in this way part of "what gives the State its

sovereign nature," *FERC v. Mississippi*, 456 U.S. 742, 761 (1982), Congress can impose its own, different definition only if it does so with unmistakable clarity, *Gregory*, 501 U.S. at 460.

The Framers established a federal republic in order to secure a number of advantages. First, because "[d]ifferent laws, customs, and opinions exist in the different states," a single government with "a uniform system of laws" could "never extend equal benefits to all parts of the United States." *Letters from The Federal Farmer, in* 2 HERBERT J. STORING, THE COMPLETE ANTIFEDERALIST 2.8.14 (1981). Federalism accommodates this diversity. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987). Second, federalism preserves the ability of each State to serve "as a laboratory" for "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Finally, "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory*, 501 U.S. at 458. "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government." THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (C. Rossiter ed., 1961).

But it is an essential precondition for any of these benefits that each State be left free so far as possible to "define[ ] itself as a sovereign" by making decisions

about the "structure of its government, and the character of those who exercise government authority." *Gregory*, 501 U.S. at 460. These are "decision[s] of the most fundamental sort for a sovereign entity," *id.*, and federal interference with them "impairs the States' integrity [and] their ability to function effectively in a federal system," *Fry*, 421 U.S. at 547 n.7 This violates the basic structure of the government our Constitution ordains and establishes.

Accordingly, for over a century, this Court has "recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see also Coyle v. Smith*, 221 U.S. 559, 565 (1911) (any suggestion that a State "could be shorn of" the "power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose" can "not be for a moment entertained"). To be sure, this Court has concluded that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," which gives "the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government." *Garcia*, 469 U.S. at 550–51. But these structural protections would be illusory if preemptive legal force were granted to choices that Congress nowhere explicitly made. "[T]o give the

state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464 (alteration in original) (quoting LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 480 (2d ed. 1988)).

This Court has thus held that Congress may upset "state decisions that go to the heart of representative government" only if it "make[s] its intention to do so unmistakably clear in the language of the statute." *Id.* at 460–61 (internal quotation marks omitted). And it has time after time wielded this clear-statement rule to whittle down expansive interpretations of federal criminal statutes that "would significantly change [ ] the federal-state balance." *Bond v. United States*, 134 S. Ct. 2077, 2089–90 (2014) (alteration in original) (internal quotation marks omitted); *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (federal arson statute); *Bass*, 404 U.S. at 349 (possession of firearm in interstate commerce); *Rewis*, 401 U.S. at 811–12 (travel act). Indeed, the Court has taken the scalpel to both the federal mail fraud and extortion statutes. *Cleveland v. United States*, 531 U.S. 12, 24–25 (2000) (declining to "subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities"); *McNally v. United States*, 483 U.S. 350, 360 (1987) (refusing to "construe the [mail fraud] statute in a manner that involves the Federal Government in setting standards of disclosure and good government for local and state officials"), *superseded by* Pub. L. No. 100-690,

102 Stat. 4508 (1988); *United States v. Enmons*, 410 U.S. 396, 410–11 (1973) (rejecting a "broad concept of extortion" that would work "an unprecedented incursion into the criminal jurisdiction of the States").

The interpretation of the extortion and wire-fraud statutes relied upon by the opinion below in affirming Governor McDonnell's conviction must meet the same fate. Because it imposes overriding federal answers to questions that go to the heart of Virginia's definition of representative government, that interpretation can be accepted only if it follows from the text of those laws with unmistakable clarity. It does not. As demonstrated above, those statutes fall so far short of unambiguously supporting the Fourth Circuit's novel interpretation that reading them the panel's way raises severe vagueness concerns. On the Fourth Circuit's view, in other words, Congress has spoken with *less* than ordinary clarity on a topic that demands *greater* than ordinary clarity. The Constitution will not tolerate such an interpretation of the federal extortion and wire-fraud statutes—and neither can our political system, if it is to continue to function. This Court should put a stop to this dangerous and unconstitutional expansion of federal bribery law.

## CONCLUSION

For the above reasons, this Court should reverse the judgment of the Fourth Circuit and vacate Governor McDonnell's conviction.

March 7, 2016

Respectfully submitted,

CHARLES J. COOPER
*Counsel of Record*
DAVID H. THOMPSON
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

*Counsel for Amicus Curiae*